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# Legalising Land Rights

Local Practices, State Responses and Tenure  
Security in Africa, Asia and Latin America

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## 6 Legalising customary land tenure in Ghana: The case of peri-urban Kumasi<sup>1</sup>

*Janine Ubink*

### Introduction

Ghana has legalised customary tenure indirectly, through constitutional recognition of customary land management and of the position of chiefs. The 1992 Constitution continues the practice started in the colonial period to vest all customary lands – which constitute approximately 80 per cent of the land in Ghana (Alden Wily and Hammond 2001:46-8; Kasanga and Kotey 2001:13; Larbi, Odoi-Yemo, and Darko 1998:1) – in the appropriate stool, skin or land-owning family<sup>2</sup> on behalf of and in trust for their people, and confirms that such lands be managed according to the fiduciary duty of the traditional authorities towards their people (articles 267(1) and 36(8)). The Constitution furthermore guarantees the ‘institution of chieftaincy, together with its traditional councils as established by customary law and usage’ (art. 270(1)). Article 270(2) stipulates that Parliament cannot interfere in the recognition process of chiefs. This power lies exclusively with the Traditional Councils and Houses of Chiefs, with a final appeal to the Supreme Court (articles 273 and 274, 1992 Constitution and sections 15, 22, 23, Chieftaincy Act, 1971 (Act 370)).

The fact that in Ghana customary land is managed by traditional authorities, does not preclude the fact that the government is to a certain extent also involved in this realm. Over the years various Land Sector Agencies have been involved in land use planning, land title registration, issuance of formally registered leases, stool land revenue collection, and adjudication of land disputes. In 1999, after decades of piecemeal legislative and state management measures, the government of Ghana formulated its first comprehensive National Land Policy in 1999 (Ministry of Lands and Forestry 1999) and has embarked, with multi-donor support, upon a Land Administration Project intended to reform land institutions and develop land policy so as to provide greater certainty of land rights for ordinary land users and enable greater efficiency and fairness in the land market (Ministry of Lands and Forestry 2003; World Bank 2003b).

This chapter studies customary land management in peri-urban Kumasi. Peri-urban areas form tenure hotspots where property relations

are subject to intense contestation and where access to wealth and authority is undergoing rapid change. Due to the expansion of urban centres and population growth, peri-urban areas are witnessing a high demand for residential and sometimes commercial land, which triggers struggles over the rights to convert farmland, now cultivated by community members, and to sell it for other purposes. Since traditional authorities have a strong position with regard to land, they play a prominent role in these conversions. Peri-urban Kumasi, the zone around the capital of the Ashanti Region, is a case in point. Kumasi is a bustling city and an important transportation hub and houses the still vibrant royal court of the Asantehene,<sup>3</sup> the powerful king of all Asante. Its number of inhabitants has grown by 4.2 per cent annually since 1960, to 1,400,000 at present. This has led to the abovementioned pressure on land in the peri-urban area. Increasingly, farmland is being converted to other uses, especially alongside the major roads to Kumasi, where access to the city is easy and electricity is available. Many peripheral villages have now become fully encapsulated by Kumasi. This chapter is based on fieldwork in nine peri-urban villages, at a range of ten to 40 kilometres from Kumasi.<sup>4</sup>

In this chapter we will study the case of 'tenure hotspot' peri-urban Kumasi to provide an insight into an example of long-term, indirect legalisation of customary tenure. The following questions will be asked: (1) How is customary land managed by traditional authorities in peri-urban Kumasi? (2) To what extent and how is the government involved in customary land management, both before and after the new National Land Policy and its implementing Land Administration Project? (3) What are the effects of this constellation on the tenure security of the indigenous<sup>5</sup> farmers?

## **Customary land management by traditional authorities**

### *Chiefs*

In the Ashanti Region it is the chiefs who are the caretakers of all customary land or stool land. According to representations of customary law in case law, textbooks and legal discourse, Ashanti convention holds that the ultimate title, also called the allodial title, of every piece of land is held in common by the members of a community,<sup>6</sup> and the chief is the custodian of such land. Chiefs are customarily and constitutionally obliged to administer and develop the land in the interests of the whole community (articles 36(8) and 267(1), 1992 Constitution). Stool lands, therefore, are communal property. As long as there is vacant land, each member of a community has the right to farm and build on part of it, which gives the member a usufructuary title<sup>7</sup>, also

called customary freehold, to the land.<sup>8</sup> The usufructuary interest can be inherited<sup>9</sup> and is extinguished only through abandonment, forfeiture<sup>10</sup> or with the consent and concurrence of the interest holder. The usufructuary cannot be deprived of any of the rights constituting the interest, and not even the chief can make an adverse claim (Asante 1969:105-106; Danquah 1928:197-200, 206, 221; Ollennu 1962:29, 55-56; Ollennu 1967:252-255; Pogucki 1962:180; Sarbah 1968:64-67; Woodman 1996:53, 66, 107).<sup>11</sup>

These customary rules date from the days when communities were involved in subsistence farming in land-abundant areas, when not land but people were of value to the chief and the community. Now that market production, population growth, and urbanisation have enhanced the economic value of land, many chiefs in peri-urban Kumasi claim that these rules are outdated and need to be adjusted to modern circumstances. They argue that communal land that can be used in a more productive way should be brought back under chiefly administration. Or, as the Beseasehene (the chief of Besease) said: 'It is a law that when the town<sup>12</sup> is growing and it comes to your farm, you do not have any land.'<sup>13</sup> These claims have seriously weakened the value and security of the usufructuary interest: when there is a demand to change the use of land from agricultural to residential, individual farmers lose the security of their usufructuary rights, and the chief claims the power to reallocate these lands.

Some chiefs, however, are taking the argument much further and are venturing to manipulate and shift the meaning of communal land ownership.<sup>14</sup> They claim that their rights to administer stool land do not derive from their function as caretakers on behalf of the community but instead assert that 'land belongs to the royal family, since it was members of the royal family who fought for the land' and the chief has administrative powers over the land as the leader of the royal family.<sup>15</sup> According to these chiefs, the royal family had only given the land out for farming purposes to temporary caretakers and can reclaim it when its use is changed without any need for compensation. 'The farmer does not lose any land since he did not own any land. The farmer is only the caretaker for the chief. The land was given to him free of charge, so how can he claim part of the money when it has been sold?'<sup>16</sup> This narrowing down of the land-owning community weakens the security of usufructuary rights even more as it degrades the nature of the customary rights of usufruct. The customary freehold is transformed into a permissive right of tenant-like character, based on the leniency of the chief instead of on the communal ownership of the land. The allodial title proportionally gains in weight and shifts from the community as a whole to the royal family, on whose behalf the chief claims outright ownership.

The argument of the first group of chiefs – that communal land which can be used in a more productive way should be brought back into chiefly administration – is only convincing if the proceeds of the conversion are used for community development such as infrastructure, education and alternative livelihood projects, which might help inhabitants of the village to make a living after the loss of their agricultural land. Although all the chiefs interviewed – even the ones who claim that land ownership lies with the royal family and not with the whole community – acknowledged that they have at least a moral obligation to use part of stool land revenue to compensate the farmer and/or for community development, actual practice differs considerably. The neighbouring villages of Jachie and Tikrom offer two extreme examples. In Jachie, the chief demarcated a large part of the village farmland for residential plots and allowed members of the community to buy this land at a very low price. The remaining plots were leased to outsiders for residential purposes. All the revenue generated has been used for community development. In the four years of his reign, the Jachiehene has built a library, a school, and a palace, and has allocated part of his land to a technical school in exchange for scholarships. The neighbouring Tikromhene provides the opposite example. He has converted and leased most of the farmland in his village without giving the community members any part of the demarcated land or any financial compensation. When a member wants a residential plot, he has to pay the market price. Out of the revenue from stool land leases, almost nothing has left the chief's palace.<sup>17</sup> As the above-mentioned examples of Tikrom and Jachie illustrate, practices regarding the division of land and revenue differ enormously. On average, however, chiefs receive unsatisfactory marks from most villagers for their administration of the land. 'So much money goes to the chief, and so little to development'<sup>18</sup> and 'Due to the greedy nature of landowners (i.e. chiefs) there is not much development in this town'<sup>19</sup> are utterances heard regularly in the villages.

The effects of the two kinds of discourses – more productive use or landownership lies with the royal family – are not that different in peri-urban Kumasi.<sup>20</sup> Chiefs from both groups are rapidly converting farmland, in which indigenous community members or families have usufructuary rights, into residential land which they allocate to outsiders through customary leases. This is leading to increasing tenure insecurity among indigenous farmers. As a result of the allocations, poor and marginalised families frequently lose their agricultural land, their employment and their income base. Apart from some positive exceptions, traditional authorities display little accountability for any money generated, and most indigenous land users are seeing little or no benefit from the leases. They are only rarely – and then very inadequately –

compensated for the loss of their farmland, and in most villages only a meagre part of the money is used for community development. Although the new lessees are benefiting from the land conversions, they are also affected by the lack of community improvement, since the areas they are building their houses in are seldom serviced with electricity, roads and sewers. Furthermore, the numerous accounts of multiple sales of the same piece of land to different buyers and of sales of alleged residential plots on land unsuitable for residential purposes show the buyer's vulnerable tenure security. In sum, the practice of customary land management in peri-urban Ghana differs widely from the constitutional provision that puts the interest of the community first (article 36(8), 1992 Constitution).

#### *Local negotiations, struggles and debates*

Local land administration practices result from continuing processes of negotiation and are not only shaped by the ideology, claims, and actions of the chief but also by the extent to which these are accepted or contested locally and nationally. The chiefs' actions in peri-urban Kumasi and their severe effects on the tenure security and livelihoods of the people are causing a great deal of turmoil among community members. Individuals, families, and other groups of people are challenging the chiefs' actions.<sup>21</sup> In some villages, people have tried to resist the reallocation of land by the chief *per se*, while in other villages the reallocation itself was accepted but the way it was done was contested, especially the division of the financial returns from the reallocation. In the following examples, both categories of resistance are discussed.

##### *(i) Resistance against the chiefs' reallocation of land*

Outsiders started to look for residential land in the village of Brofeyeduru about fifteen years ago. 'At first it was the chief selling<sup>22</sup> these plots, but the farmer did not get his right percentage', i.e. the chief paid no compensation to the farmer.<sup>23</sup> After a while, the chief's sisters went to talk to him, and he allowed first one and then all of his siblings to sell their own land. When word got out, other people also started selling. 'The chief is letting it go. He signs the papers after the sale for some money.'<sup>24</sup> Although the people in Brofeyeduru successfully resisted the actual sale of their land by the chief, they do not in general deny the chief's right to sell. Some villagers explained their behaviour as follows: 'The right thing would be for the chief to sell it. But if the chief does that, the farmer does not get much money. Since everyone is poor here, the chief has to allow it.'<sup>25</sup>

In Besease, unlike in Brofeyeduru, many people deny outright their chief's claim that he can reallocate their land. The majority of the villa-



gers acknowledged the chief's right to be informed about a sale, to sign the land allocation papers, and to receive a signing fee for this service – although some said it should be the buyer who takes care of these issues and not the seller – but they claimed the farmers were the only ones to initiate a sale and to receive the money paid for the land: 'When the town reaches my land, I can sell it. The *abusua panin*<sup>26</sup> and the chief have no say in that;<sup>27</sup> 'If the chief wants a third of the money when I sell land, I will take the case to court.'<sup>28</sup> Land transactions in Besease thus display ongoing struggles between the four land-owning chiefs and their people. 'If you are very persistent, the chief cannot take your land away,' a farmer explains. 'You can sell it and give part (of the money) to the chief. But if you are unlucky, the chief will take the land, and if you don't fight it, you won't get anything.'<sup>29</sup>

Struggles over land can sometimes lead to violent incidents between villagers and the chief. For instance, the Beseasehene sold land that did not belong to his family. When the buyer started to develop the land, the family that had the customary freehold in the land stopped him. After the buyer applied to the chief to recover his losses, the chief 'went to the land-owing family to plead, but he nearly got beaten up'.<sup>30</sup> In some villages there have even been large-scale violent uprisings of commoners against the chief. For instance in Peki No. 2, where the chief sold a large part of the village land to the Deeper Life Christian Ministry and then pocketed the money, the commoners chased both the chief and the church representatives out of the village, killing one of the latter in the process.

Of the nine villages studied in depth, only in Boankra – where there has not been a chief for the last fourteen years – did the royal family seem to acknowledge the families' rights to initiate the sale of land: 'When the new chief comes, the clans can still sell their own land, but with the consent of the chief, who will 'take something' for the stool.'<sup>31</sup> However, it remains to be seen what position the royal family will take in land negotiations when a new chief is enstooled.

*(ii) Resistance against the way chiefs reallocate land*

In a number of the case-study villages, people did generally accept the fact that chiefs were reallocating community land, but they vehemently opposed the procedure and the division of revenues. The previously mentioned village of Tikrom presents a worst-case scenario with regard to community development. According to a Unit Committee member, 'the Tikromhene is selling land without consulting anyone, compensating the farmer, or giving part of the revenue to the town', and part of the remaining land has been degraded or even destroyed as a result of sandmining.<sup>32</sup> Furthermore, the chief does not abide by the planning

scheme and has, for instance, sold land that was reserved for the school.

A long process of consultation took place between the chief and the community. At a series of village meetings, the people requested a substantial percentage of land revenues for community development, but to no avail. They then tried to involve the chief from their place of origin, but this chief did not want to come and talk to his 'son'. As the Tikromhene comes directly under the Asantehene, the former assemblyman<sup>33</sup> then wrote a petition to the Asantehene in May 2002. However, the case has never been called before the Asantehene, and it is assumed by some that the Tikromhene has encouraged the secretary of the Asantehene to remove the petition from the files. In addition, the former assemblyman has brought in the Environmental Protection Agency (EPA) to investigate the chief's sandmining close to streams. The EPA came, looked and reproached the chief, but does not have the power to prosecute. Such power lies with the District Assembly, but it is rarely used. A local radio station discussed the sandmining problem in Tikrom in one of its programmes, in which the assemblyman appealed to the Asantehene for help, but there has been no response.

As the example of Tikrom shows, local assembly members often play an important role in challenging misadministration by chiefs. In many villages, the same role is played by members of the Unit Committee, the lowest level of local government in Ghana. One of their popular procedural solutions to the misadministration of stool land is the establishment of a village committee, usually called a Plot or Land Allocation Committee, to oversee the proper allocation of village land. Such a committee usually consists of representatives of the chief and his elders and representatives of the village, often Unit Committee members. The Plot Allocation Committee checks that the site plan is in accordance with the planning scheme, and it has to sign the allocation papers. The existence of such a committee normally coincides with the transfer of a fixed portion of the revenue to the community for development. Although many chiefs pay lip service to such committees, they usually work with a committee made up solely of elders and the chief himself, and popular attempts to set up committees with a broader representation have often been frustrated by the chiefs.

The kinds of activities undertaken in Tikrom to challenge the chief's style of stool land administration were also found in many other villages and appear to be a common response to misadministration by chiefs. Their success is often limited, leaving the people with feelings of desperation or resignation that they have been left to their own devices. The following statements by two former assemblymen aptly illustrate these feelings: 'In Europe, if a government is criticised three times, the government goes. But here people come to beat you up in-

stead';<sup>34</sup> 'People who lose their land to the chief usually don't go to a chief or to court, normally they give up.'<sup>35</sup>

Because of this lack of success in negotiations with the chief, many people do not aim their anger and resistance at the chief who is selling the land but at the buyer. Both my fieldwork and a study of pending cases at the High Court of Kumasi show that the farmer, who is angry that his land has been sold by the chief, often tries to restrain the buyer from going onto the land and building there. For instance in Adadeentem, the former chief sold substantial portions of the community's land. This aroused a lot of dissatisfaction amongst the people, but no concrete actions were taken against the chief. One of the villagers, however, sued the buyer of a vast tract of land in the High Court of Kumasi. Another example of the 'buyer loses out' principle is found in Besease, where the Beseasehene sold two plots of land belonging to his subchief, the Kontihene. On finding out about the sale, the Kontihene first 'caused trouble with the Beseasehene', but 'we enstooled him, so (...) we don't want to quarrel with him. But the buyer can't come and work on it. If you come to work you will meet the Konti.'<sup>36</sup>

#### *Traditional controls on chiefly administration*

Chiefs often reject people's suggestions and claims about adjusting stool land administration and continue to rule as they always have done. This poses the question of how is it possible that these chiefs cannot be steered away from their devastating track? Are there no checks and balances on their administration? A literature survey of some of Ghana's 'grand old men' in the field of customary land tenure yields the following quotes: '(T)he occupant of the stool can only bind the stool, i.e., the town or community, if he acts with the consent and concurrence of the whole town or community represented by the sub-chiefs, and the principal councillors from the various sections' (Ollennu 1962: 130). 'Hereditary'<sup>37</sup> councillors, or elders as they are called in the lower councils, and chiefs or sub-chiefs in the higher ones, are the heads of houses, families, or towns who have been elected by members of a house, family, or town to be their respective head, patriarch, or chief. (...) They hold their offices in the pleasure not of the Chief or head Chief, but by the sufferance of the people who have elected them to the Council. (...) It is of utmost importance, in view of our form of government, for the Chief, who is always the President of his Council, to give due weight and make full allowance of the expressed opinion of these councillors' (Danquah 1928:57). 'The chief was bound by his oath to consult the elders on all matters, and to obey their advice' (Busia 1951:14). To supplement these authoritative but not too recent writers<sup>38</sup> with a contemporary influential voice, I turn to Kasanga who, less spe-

cifically but equally romantically, states that 'there are reasonable checks at the local level on almost everybody' (Kasanga 2000a:72; cf. Kasanga and Kotey 2001: 31).

According to these writers, traditional responsibility for village chiefs thus rests on two pillars. The first pillar is made up of a council of elders, selected by and representing all major factions of the community, without whose consent the chief cannot make any decisions. The second pillar consists of the possibility to destool seriously malfunctioning chiefs. Leaving aside whether traditional rule was ever so equitable and well-balanced as these authors claim – which has been convincingly refuted in the extensive oeuvre of McCaskie (including McCaskie 1992, 1995, 2000a) – the current performance of chiefs in peri-urban Kumasi at least disabuses us of the idea that the two pillars function effectively in present-day village practice.

To begin with, in a number of case-study villages, the council elders are primarily or even entirely selected from the royal family and not from the important families in the community, as in Kotwi. The Kotwi stool was originally carved out of the Asampong stool, and the Kotwihene was like a subchief to the Asamponghene and thus did not have his own subchiefs. Later, the Kotwihene was upgraded, and he now swears his oath directly to the Asantehene. Although he could now have subchiefs, he has not installed any. He has continued to discuss village affairs with the elders from his family, and when there is a public ceremony, the Asamponghene and his subchiefs will join the Kotwihene and his elders. The absence of a council representing the whole community was encountered in a number of the other case-study villages as well. Furthermore, the rule that elders hold their offices not in the pleasure of the chief but to serve the family that has elected them also seems to be under strain. For instance in Nkoransa, where the secretary of the chief explained that 'it is not the rule that a certain family always brings a subchief. It is the chief who picks them. When one dies, he can choose a new one'.<sup>39</sup> This is underpinned by the abundance of conflicts between elders and their own family, who can no longer dismiss them when unsatisfied.<sup>40</sup> Regardless of the composition of the council, the chief often co-opts his elders by sharing the benefits from land administration with them, removing their incentives to effectively check the use of power and, if necessary, to stand up against the chief (cf. Abudulai 2002:83). According to a UC member of Tikrom, 'the subchiefs support the chief because they get a share of the money. If they argue with him, they won't get anything'.<sup>41</sup> Even at the Asantehene's Land Secretariat it is acknowledged that 'in many villages the elders connive with the chief'.<sup>42</sup> And those elders that are not co-opted are often simply ignored by the chief, as is aptly illustrated by the following statement: 'Beseasehene is a new chief. He doesn't mind

the rules,' says his Kontihene subchief, 'I tried to talk to him, but he didn't take my advice. If I wasn't educated, he would try to cheat me as well.'<sup>43</sup>

When the people of a community want to destool their chief, a case has to be brought before the Traditional Council, which is made up of the paramount chief and his subchiefs.<sup>44</sup> A first hurdle is that destoolment charges cannot be brought by commoners but only by the 'king-makers', i.e. those subchiefs and members of the royal family who can also make or enstool a chief (Hayford 1970:36). As discussed above, these subchiefs are often co-opted and are therefore not likely to take the lead in actions against the chief. And if they do dare to do so, according to one of the subchiefs of the Ejisuhene, this is only 'after many years of wrongdoing, the chief will first be given the benefit of the doubt'; to explain why they have waited so long to start a destoolment case against the chief, he adds: 'The kingmakers have deposed the previous Ejisuhene and installed this one, of whom they had high expectations. They now lose part of their legitimacy when they want to destool the one they selected.'<sup>45</sup> If those years of waiting are added to the years the destoolment procedure itself may take, it is obvious that a chief can easily come to sell a considerable amount of stool land and spend the proceeds as well. A second obstacle lies in the fact that the paramount chief, who chairs the Traditional Council, often has a direct interest in who occupies the village stool, mainly because of his claims to a share in the villages' land revenues. The paramount chief of Ejisu, for instance, favoured those chiefs who sold large amounts of stool land and shared the proceeds with him. The fact that this did not usually leave much land or revenue for the community did not seem to bother him. Furthermore, to mention a third hindrance, the members of the Traditional Council consist of direct colleagues of the chief-on-trial. Many of the current destoolment charges are to do with land administration in one way or another. And often the charges against the chief-on-trial, such as selling farmland and not using enough stool land revenue for community development, are also points of discussion in the villages of the judging chiefs. Clearly, their personal interests in such cases may stand in the way of objective and impartial judgment.

The main customary checks and balances on chiefs – ruling in council with subchiefs and the possibility of destoolment – are not very effective therefore. One can add to this the fact that chiefly accountability is extremely low. Most land administration is concealed due to a lack of registration. A good chief may account for his administration of his own accord, but this is an exception rather than the rule. Some elders and chiefs claim that 'nobody has the right to ask the chief to account',<sup>46</sup> and 'if it goes wrong, there is nothing to do about it'.<sup>47</sup> They explain this by the fact that the chief also has his professional income,

and it is impossible to know whether he is spending personal or stool money. Or they say that 'the chief does not receive any remuneration but does have job-related expenses, to which the people do not want to contribute'<sup>48</sup> and that the chief continues to have obligations for which customary provisions have ceased.<sup>49</sup> Others claim that to ask a chief to account for his expenditures is considered a vote of no confidence. 'If a chief does his work well, no one will bring him to account.'<sup>50</sup> Most people will not dare to do this unless there are clear indications of serious misconduct by the chief. And even then, 'who is to bell the cat?' The chief is still a powerful figure in most villages, and one is certain to encounter his wrath by highlighting irregularities in his actions. Moreover, taking action against a chief violates his traditional sanctity. Most people would consider it the task of the royal family, and if the royal family does not enact this task, how can commoners be expected to take it upon themselves? The only kind of functioning accountability is what I call 'end-term accountability'. During destoolment procedures, a chief has to account for all stool revenue, but by then most of the money has usually been spent and is very hard to recover. Besides, as noted, starting a destoolment procedure brings its own difficulties.

*Colonial distortion of checks, balances and accountability*

The current customary system lacks effective checks and balances and accountability, but this is not surprising when the historical development of the position of the chiefs is taken into account. During the colonial period, local checks and balances and accountability structures were severely distorted when the British government overrode the traditional rules of investiture and reserved for itself the right to appoint and dismiss chiefs (Annor 1985:153; Busia 1951:105-6; Toulmin and Quan 2000a:10; Van Rouveroy van Nieuwaal 1987:11). With this 'devolution', as Von Trotha (1996:81) calls it, the local attachment of the chief to some extent gave way to his responsibilities and loyalties towards the government. Where commoners tried to reassert local checks and balances, a chief who was on friendly terms with the British administrator was easily able to discredit the commoners by branding them as malcontents and troublemakers (Kumado 1990-1992:203; McCaskie 2000b).

The British gave the chiefs strong rights in land by accepting their claims that according to customary law, all land belonged to a customary community with the chief as the administrator. However, they did not give the chiefs free reign in all aspects. They regularly held them to account, monitored the bylaws they made, and intervened in local conflicts, thereby to some extent compensating for the lack of local checks and balances, at least in the field of land administration (Crook

1986:88; Dennis 1957). Post-colonial governments in Ghana have shown an ambivalent attitude to chieftaincy (Kofi-Sackey 1983; Kumado 1990-1992; Nugent 1994; Ray 1996; Van Rouveroy van Nieuwaal 1987, 1996), and the pendulum has swung between devolution and the prohibition of governmental interference. Although under the current Constitution the Ghanaian state is not permitted to exercise its sovereignty over chiefs regarding their enstoolment and destoolment (article 270(2), 1992 Constitution), the pre-colonial local checks and balances and accountability structures have not been rebuilt. A crucial question therefore is whether the current government can also impose state constraints on the administration of chiefs to compensate for the lack of local checks and balances.

### **State involvement**

We have seen that the 1992 Constitution vests all customary or stool lands – which constitute approximately 80 per cent of the land in Ghana – in the appropriate stool on behalf of and in trust for their people, and confirms that such lands must be managed by traditional authorities (articles 267(1) and 36(8), 1992 Constitution). Notwithstanding these provisions, the state has sought to regulate certain aspects of stool land management. Over the years various governments have taken piecemeal measures in the areas of land use planning, land title registration, issuance of formally registered leases, stool land revenue collection, and adjudication of land disputes. This section of the chapter will first describe the mandate as well as the actual functioning of the principal state institutions involved in these fields to show the checks and balances they are able to place on chiefly administration. Then it will emphasise some of the political constraints state institutions face by looking at the government's policy of non-interference with regard to chieftaincy. Finally, it will discuss current policy efforts under the National Land Policy (Ministry of Lands and Forestry 1999) and the Land Administration Project (Ministry of Lands and Forestry 2003; World Bank 2003b).

#### *Office of the Administrator of Stool Lands*

The Constitution provides for an Office of the Administrator of Stool Lands (OASL), which was established by the OASL Act, 1994 (Act 481). This office is responsible for the establishment of a stool land account and for the collection of all 'rents, dues, royalties, revenue or other payments whether in the nature of income or capital from the stool lands' to be paid into this stool land account (article 267(2), 1992

Constitution and section 2, OASL Act, 1994 (Act 481)). Of the revenue accruing from stool lands, ten per cent is paid to the OASL to cover administrative expenses. The other 90 per cent is to be disbursed in the following proportions: 25 per cent to the stool for its maintenance; twenty per cent to the traditional authority; and 55 per cent to the District Assembly (Sections 3 and 8, OASL Act, 1994 (Act 481)). Although this could curb the appropriation of stool land revenue by chiefs for their personal use, there is no legal requirement that the 25 per cent of the revenue received by stools is reinvested in the community. Rather, the provisions encourage chiefs to retain the revenue 'for the maintenance of the stool in keeping with its status'. The use of the twenty per cent share to the Traditional Council is not specified. According to Alden Wily and Hammond (2001:118-119), the government in this way 'endorses the perception of chiefs of themselves that they are the owners, not merely trustees acting on behalf of the real owners, the community at large'.

This provision has a long history pre-dating the current 1994 Act. It dates back to the Local Government Ordinance, 1951 (Cap 64), and its original purpose was to be the first step in depriving the big chiefs of any role in land management and eventually of ownership and their claims to have the right to collect land 'rents' (Rathbone 2000:30). Chiefs, therefore, have always resisted handing over 'their' income to the OASL. Since in peri-urban areas the conversion from agricultural to residential land accounts for most land revenue, chiefs in these areas centre their resistance on the definition of stool land revenue. They claim that the money they receive for the allocation of land is not purchase money but 'drink money' or 'drinks'. They refer to the custom of bringing some drinks to the chief when acquiring land from him as an acknowledgement of the ownership of the land, to show allegiance towards the chief, and for the customary pouring of libations on the ground to seek the gods' blessings for the transaction. Where a bottle of Schnapps was sufficient in times of land abundance, when land became more valuable a small amount of cash money was added to the Schnapps. In peri-urban Ghana and other areas where land is highly valued and demand is increasing, the amount of cash demanded has gradually risen and now effectively constitutes a market price for the purchase of land leases (Alden Wily and Hammond 2001; Edusah and Simon 2001; Kasanga and Kotey 2001; McCaskie 2000b). The chiefs continue to call this payment 'drinks' and claim that it should therefore not be regarded as 'stool land revenue' in the sense of the OASL Act, and they resist the disclosure of the sums collected. In peri-urban areas, the only land revenues that flow to the OASL consist of ground rents – annual governmental fees payable on land leases – which are distributed according to the constitutional formula. These rents are



small compared to the sums of 'drink money' collected directly by the chiefs in selling land leases. The total amount of ground rent on a 99-year residential lease adds up to about five per cent of the amount of 'drink money'. Because 'drink money' is portrayed by the chiefs as a ritual device rather than the means of exchange in a sales transaction, it is not collected by the OASL, and so not subject to distribution under the constitutional formula, and thus becomes, effectively, part of the chief's income.

Contrary to Kasanga and Woodman (2004:185), who for unclear reasons claim that 'it has been accepted by everyone concerned that those (sums in 'drinks') do not amount to revenue from stool lands within the meaning of the statute law', most officials interviewed consider that the law meant to include this 'drink money' in the definition of 'stool land revenue'.<sup>51</sup> This interpretation seems to square with the very broad definition of stool land revenues provided in the OASL Act, as quoted above. This issue has, however, never been tested in the courts. In the highly personalised society of Ghana, if a case were brought to court by an officer of the OASL, this would not be considered an action on behalf of the government, of the ruling political party, or even of the OASL in general, but as a personal action of that particular officer. Such an action would surely provoke the wrath of all of the chiefs. According to the District Chief Executive of Ejisu-Juaben district, 'The one who does it will become an enemy of the chiefs', and this can pose serious dangers to the career of the official concerned.<sup>52</sup> In a number of cases officials have been 'transferred' after standing up to a powerful paramount chief or the Asantehene. According to the District Chief Executive of Ejisu-Juaben district, 'careless statements by land officials could be dangerous. They may have to pay a price for discourtesy'.<sup>53</sup> Furthermore, as the Deputy Regional Lands Officer in Kumasi explains, every official is also 'subject of a stool and subordinate to the chief', and such an action would be considered an act of disloyalty towards him.<sup>54</sup> The one official we encountered who did want to go to court over a sum of 'drink money' of Cedis 3 billion (at the time of sale the equivalent of approximately € 300,000) claimed that he was stopped by 'the government', because 'the President does not want to pay for such an action'.<sup>55</sup>

The lack of an effective political mandate for the OASL to exercise the role intended by the constitution is only part of the story. A lack of funds, qualified staff, equipment, and vehicles on the one hand, and mismanagement, corruption, and lack of accountability in the OASL's own use of land revenues on the other (Grant 2004:20-21, 40-41; Kasanga and Kotey 2001:iii; Kasanga and Woodman 2004:185) also severely hamper the functioning of the OASL and affect its legitimacy in the eyes of the people. To date, the revenues collected and distributed

by the OASL have never been publicly disclosed, and the use of land revenues received by all parties remains unaccounted for and non-transparent. Accusations of irregularities in both spheres are rampant.

### *Lands Commission*

The Lands Commission (LC) first came into existence following the 1969 Constitution, under the Lands Commission Act, 1971 (Act 362), and operates under the Lands Commission Act, 1994 (Act 483), since the advent of the 1992 Constitution. The LC is responsible for the management of all public and vested lands,<sup>56</sup> is meant to advise and make recommendations on policies with respect to land use and development, and advise on and assist in the execution of the registration of land titles (section 2, Lands Commission Act, 1994 (Act 483)). With regard to stool land, section 4 of Act 483 states: 'There shall be no disposition or development of any stool land by any person unless the Regional Lands Commission (...) has certified that the disposition or development is consistent with the development plan drawn up or approved by the planning authority' (cf. art. 267(3) of the 1992 Constitution). This section continues the practice begun in 1962 by the Administration of Lands Act, 1962 (Act 123) to require the consent of the state to the alienation of stool land (Kasanga and Kotey 2001: 3). Thus, if a stool wants to dispose of land, it has to ask the LC for its consent and concurrence. This could enhance the tenure security of the indigenous farmers. However, in practice, consent before an allocation of stool land is never sought. Concurrence after the allocation is sometimes sought, although not by the chief but by lessees who want to formalise their acquisition, and this is still quite rare. Typically, only the more educated people or people with connections in the bureaucracy go through the long,<sup>57</sup> cumbersome, and expensive process of formalisation.<sup>58</sup> The provision of consent and concurrence is not enforced by the LC and therefore does not in practice provide an effective check upon the administration of lands by chiefs. Like the OASL, the LC is hampered by a shortage of trained and motivated staff, lack of basic logistics and support services, poor remuneration and incentive packages, low morale, and endemic corruption (Report on the Beneficiary Assessment Survey of the Lands Commission – Ghana, 1997, quoted in Hueber and de Veer 2001:195; Centre for Democracy and Development 2000:99-105; Grant 2004:21-21, 40-41, 95; Kasanga 2000b:14; Kasanga and Kotey 2001:iii, 8).<sup>59</sup>

### *District Assembly*

The Local Government Act, 1993 (Act 462), designates District Assemblies (DA), which have been created since 1986 but only received constitutional backing in 1992, as the main planning authority charged with the overall development of the district. With regard to land administration, they have legislative powers to make bylaws with respect to construction, sanitation, and the environment. The preparation and approval of planning schemes, the granting of building permits, and the enforcement of regulations and sanctions for non-compliance all rest with the DA (Kasanga and Kotey 2001:9). Villages and towns are supposed to draw up a land use planning scheme with the help of the Town and Country Planning Department (TCPD) of the DA. Such a planning scheme designates the uses of the various areas, and shows the boundaries of the individual plots. When a prospective developer applies for a building permit, the TCPD has to check whether the site plan conforms to the planning scheme, and whether the allocation paper is signed by the local chief.

Ammissah et al. (1990:34, quoted in Hueber and de Veer 2001:19) argue that 'Since the main aim of the chiefs is to maximise financial returns within the shortest possible time, important land uses such as open spaces, playgrounds, schools, markets, refuse dumps, roads, etc. are sacrificed, in order to augment the supply of building plots. This is a major cause of haphazard and unauthorised development in all statutory planning areas'. By means of the land use planning process, the DA could provide some checks on the land administration by chiefs, preventing double allocations,<sup>60</sup> and reserve land for public purposes or even for agriculture. Chiefs can prevent the drawing up of a planning scheme, however, by withholding their cooperation and not providing any information. 'If a chief does not cooperate, you cannot make a planning scheme.'<sup>61</sup> According to the TCPD in Ejisu, 'It is to the benefit of the chief not to have an approved planning scheme. Therefore, the cooperation of chiefs is not very high. Most have their own unapproved planning scheme'.<sup>62</sup> Furthermore, although awareness of planning schemes, and building permits is increasing, it is still low, and most people do not comply with the demand for a building permit, or partly due to the lengthy<sup>63</sup> bureaucratic procedures and the costs involved, the building precedes the formal planning process (Edusah and Simon 2001: section 4.4; Hueber and de Veer 2001:191; Toulmin and Longbottom 2001:29-30).<sup>64</sup> Finally, fieldwork showed that the implementation of planning regulation is often lacking, due to a lack of personnel, funds, and logistics (cf. DFID/Toulmin, Brown, and Crook 2004:12; Hueber and de Veer 2001:188-9; Kasanga and Kotey 2001: 9-10) and mismanagement and corruption (cf. Kasanga 1996:99; Kasan-

ga and Kotey 2001:iii). And even when violations are found, severe sanctions, such as demolition of unauthorised structures, are avoided (cf. Hueber and de Veer 2001:191).

Furthermore, when the DA does not have a financial interest, it tries not to get involved in 'local affairs'. For instance, if there is more than one land-owning chief in a village, the TCPD will accept a signature of any one of the chiefs as a valid one. And if there is an agreement within a village that a Plot Allocation Committee – a locally initiated committee consisting of representatives of both the chief and the village that should sign all allocation notes and secure a percentage of the revenue for community development – should also sign the allocation papers, this is considered an internal village affair by the TCPD, and they do not check whether such a signature is found on the allocation paper. In this way, the locally agreed upon solution to problems of transparency and distribution of land revenue is not supported by the government.

While the land use planning system could in theory provide a check on chiefly land administration, it also provides chiefs with additional powers in local struggles over land. The formalisation of the land allocation process by the government, with the signature of the chief as a key element, gives chiefs an extra-official card to play, especially those higher up in the hierarchy of traditional authorities. For instance, Abudulai (2002) describes how in Tamale the sub-committee of the LC attributes most of the problems in the field of land administration to the lack of documentary evidence. It therefore decided that divisional chiefs must countersign allocation papers to bring some order into the system. Similar actions were encountered during fieldwork at the DA in Ejisu – where it was decided that building permits could be given only when the allocation papers bore the countersignature of the paramount chief, so as to prevent future land disputes and litigation, not least involving the paramount chief himself – and at the LC in Kumasi – where despite a court ruling that Kaase stool lands did not fall under the authority of the Asantehene, the LC tried to convince the Kaasehene to have all land allocations countersigned by the Asantehene at the cost of one-third of the purchase price.<sup>65</sup> A comparable example is found in the distribution of OASL revenues, which are usually paid to the paramount chief, who is supposed to redistribute them in his area according to the constitutional formula. These actions can be explained by a combination of 'administrative efficiency' – dealing with one big man instead of a whole group of people – and attempts to satisfy the person with the greatest troublemaking capacity.

Every electoral area has its own representative at the DA. In many villages, these local assembly members and the members of the Unit Committee (UC) – the lowest level of local government – are public fig-

ures, who are widely known, easily accessible, and often most actively involved in development of the community. They are aware of the fact that a lot of money for town development could be generated by stool land allocations. It is therefore not surprising that where chiefs are unwilling to distribute land revenues, UC and DA members are often in direct confrontation with the chief, or lead the public actions against him. Yet, while the UC and DA members are a local force to be reckoned with, they are not often backed by the district authorities. The District Chief Executive (DCE) of Ejisu, for instance, while acknowledging the negative effects of chiefly land conversions in his district, went no further than the occasional public statement that chiefs should spend part of the land revenues on community development. When we proposed the idea to back up local Plot Allocation Committees (PACs) by providing building permits only when allocation papers carry the PAC's signature, he rejected the proposal because land revenue would then be spent by the UC and fall outside his own responsibility.<sup>66</sup> More generally, during the UC and DA inauguration ceremonies, members are often instructed to refrain from interfering in chieftaincy and land matters.<sup>67</sup>

#### *State courts*

As regards the position of state courts in the field of customary land management, chiefly re-appropriations and conversions of stool lands in which community members have a usufructuary interest are not supported by court decisions (Ubink 2002-2004). Although a trend can be discerned in judicial customary law – rules of customary law as set out by the courts – towards more power to the chief as administrator to ensure sound town planning and a more equal distribution of land, this cannot be interpreted to mean that the chief has the power to deal with land as he wishes, without regard for community interests or compensation for farmers. Customary law in the Ghanaian courts rather conveys an image of protection of usufructuary rights against the chiefs' attempts to re-appropriate stool lands for 'development' purposes. First, usufructuary rights are quite secure. Second, the transfer of the usufructuary title does not need the consent of the allodial title holder. This seems even to apply when farmland is transferred for non-farm purposes, such as housing or cemetery plots. And even if a chiefly grant were needed to change land use from agricultural to residential, as was stated in one court case,<sup>68</sup> it seems that the community member has a right to receive this grant unless overriding communal interests prohibit it. Third, chiefs can be held accountable for the way they use stool land revenues, since there is a 'statutory imperative that

moneys from stool land acquisitions should be lodged in a designated fund'.<sup>69</sup>

Although state courts protect the interests of indigenous farmers whose land is being re-appropriated by the chief, the effect of such court decisions on local land practices and tenure security is limited. Notwithstanding the large number of land cases in the courts, many more land conflicts never reach them, either because of the aggrieved parties' lack of access or interest, or because the land conflicts are embedded in 'chieftaincy affairs' for which state courts have no jurisdiction (section 15(1) Chieftaincy Act, 1971 (Act 370)). Moreover, court decisions seem to have little effect on land disputes beyond the specific cases on which the court decides. This can be explained by a number of factors: First, people have minimal knowledge of court decisions. During fieldwork, people hardly referred to case law or legislation, and when they did they often misunderstood it or invented their own provisions. Second, the existence of an arena for strong local chiefs, hardly constrained by local checks and balances and – as we will see in the next section – also barely controlled by the government, which explains why chiefs do not feel bound to comply with the rules of customary law as set out by the courts.<sup>70</sup>

#### *A policy of non-interference*

In the sections above a number of examples display a lack of political willingness to enhance the functioning of Land Sector Agencies (LSAs) such as the OASL and the LC and strengthen their checks on chiefly land management: the unwillingness of the political establishment to bring before the court the question of whether 'drink money' is stool land revenue in the sense of the OASL Act; the instructions to DA and UC members to abstain from chieftaincy affairs; and the refusal of the TCPD to check land allocation notes for a signature of the Plot Allocation Committee, where such committees exist.

This lack of political support – which results in large part from a deference to chiefly authority and power amongst local government officials – is also mirrored in the policy discourse of the present government. In the media, government officials at all levels regularly and vehemently proclaim that they will not 'meddle in chieftaincy affairs'.<sup>71</sup> According to Boafo-Arthur (2003:138), President Kufuor himself 'has made it clear that the current ruling party is not interested in meddling in chieftaincy affairs.' These 'non-interference' statements are sometimes made in reaction to chieftaincy disputes, over which section 15(1) of the Chieftaincy Act, 1971 (Act 370), declares the government has no jurisdiction, but also to express in more general terms that the government will not interfere in chiefly administration such as in the field of

land management, which is not dictated by any legislative provision whatsoever. For instance, the former coordinator of the Land Administration Project at the Ministry of Lands and Forestry asked in an interview: 'Is it the business of the government to address the accountability of chiefs? Within the local system there exists accountability, they can 'destool' a chief, or remove his authority. We do not want to impose accountability on the chiefs, since land is essentially a chief's thing.'<sup>72</sup> And the former Minister of Lands and Forestry, Professor Kasanga, argued that 'The state should not attempt to enforce local checks and balances. This should be done by the citizens themselves.'<sup>73</sup> Obviously, such state discourse, together with what we refer to as the government's 'policy of non-interference', provides chiefs with ample room for manoeuvre and gives them little reason to fear state intervention in land matters.

The primary basis for the present government's policy of non-interference appears to be a deliberate political alliance with powerful chiefs, coupled with a recognition of the chiefs' considerable local political power and influence and their roles as the key vote-brokers, especially in the rural areas. In addition, the current tendency to fill chieftaincy positions with highly educated professionals blurs the traditional distinction between the governmental elite and the chiefs, and creates new alliances between these two groups (Ray 1992).<sup>74</sup> The elite of the party presently in power, the NPP, is especially closely connected to the chiefs. Not only does it have its stronghold in the Ashanti Region, with its powerful chiefs, but President Kufuor himself is connected through marriage to the royal family of the Asantehene. Many members of the current government, up to high levels, are chiefs or royal family members in their hometown. It should also be noted that rampant irregularities and mismanagement by state institutions in procedures of compulsory acquisition of land do not give the state a strong moral position from which to judge the quality of chiefly land administration (Kotey 1996; *Daily Graphic*, 22 August 2002, 17). Moreover, when the state needs to make new land acquisitions itself, a cooperative relationship with chiefs will be useful.

Chiefs seek to capitalise on the government's current support for chieftaincy by rekindling discussions on certain subjects, such as: the creation of a second chamber of parliament consisting of chiefs; the representation of chiefs on DAs; the referral of all proposals for legislation to the National House of Chiefs for comment as an integral part of the legislative process; the de-vesting and return of former stool lands vested in the President; and an increase in the percentage of stool land revenue to be disbursed by the OASL to the chiefs.<sup>75</sup> Chiefly statements and demands on these issues at workshops and policy meetings generally go unchallenged by government representatives.

The overall picture of governmental intervention in customary land throughout most of the post-independence period is one of piecemeal attempts to control the management of stool lands. We have seen that the government has constitutionally recognised customary land management and the position of chiefs. This indirect legalisation was supplemented by state institutions created and mandated to act as a check on stool land management. These institutions do not, however, in reality exercise effective control upon the chiefly administration of land due to a combination of factors: a lack of chiefly cooperation with the tasks and duties of LSAs; the LSAs' lack of funds, staff and material and their problems of mismanagement and corruption; and the difficulties for and unwillingness of officials to challenge chiefly behaviour. In this context, the lack of political interest by the present administration to contest the authority of the chiefs by tackling their frequent lack of co-operation in land matters is so pervasive that we can speak of a policy of non-interference.

#### *Land Administration Project*

Against this background of state institutions and discourse, the government of Ghana, after decades of piecemeal legislative and state management measures, formulated its first comprehensive National Land Policy in 1999 (Ministry of Lands and Forestry 1999) and has embarked, with multi-donor support, upon a Land Administration Project (LAP) intended to reform land institutions and develop land policy so as to provide greater certainty of land rights for ordinary land users and enable greater efficiency and fairness in the land market (Ministry of Lands and Forestry 2003; World Bank 2003b). Under the LAP the medium- to long-term plan is that government should divest itself of responsibility for the management of stool lands. This should proceed incrementally, on the basis of the satisfaction of certain criteria, including the setting up of Customary Land Secretariats (CLSs) with appropriate governance structures to assure institutionalised community-level participation and accountability in the use of stool land and the revenue it generates. CLSs were expected to improve record-keeping and strengthen the accountability of customary authorities in land management, which would in turn 'bring benefits in terms of: lower costs and simpler methods for confirming claims to land; easier public access to information regarding land use and holdings; improved boundary dispute resolution; and opening up of debate at local level regarding the procedures and norms which should guide land administration' (DFID/Toulmin, Brown, and Crook 2004: para 39). The principal beneficiaries were expected to be the majority of people for whom the current land administration system is effectively inoperable due to the lack



of transparency in the land allocation process, uncertain tenure rights, high costs, and slow and complex bureaucratic procedures (DFID/Toulmin, Brown, and Crook 2004: para 6).

Guaranteeing tenure security of small land owners in peri-urban Ghana against powerful chiefs and elders requires a clarification of the nature of usufructuary rights and a protection of these rights against the chiefs' conversion drive (cf. DFID/Toulmin, Brown, and Crook 2004:19; Ministry of Lands and Forestry 2003:13; World Bank 2003b:37). Alden Wily and Hammond (2001:28, 54) show, however, that during the LAP conception and design process there was no wide and open discussion of the role of chiefs in the administration of stool land – including the tendency of chiefs to behave like private landlords – or of the possible checks and balances the state could place on stool land administration. Furthermore, from the inception of the LAP, it has been the government's clear political choice that CLSs should fall under the aegis of traditional authorities rather than opting for more community-based approaches to the management of customary land. By placing the CLSs under the aegis of the chiefs, the LAP ignores the fact that the notion of the 'customary' powers and rights of chiefs is loaded with political inventions and endorses the roles that chiefs were accorded in land administration in the colonial period as if this is a timeless principle of customary tenure (Amanor 2005b:110-1). This approach, which was not necessarily the donors' intention, enhances the risks of elite capture of increasing land revenues to the detriment of ordinary land users.

In the pilot phase of the CLSs, the government has displayed strong reserve in dealing with chiefly prerogatives and accountabilities (Ubink and Quan 2008). For example, through the CLS pilot process, LAP staff have opportunities to introduce Memoranda of Understanding (MoUs) between the Ministry and the chiefs, setting out the responsibilities on both sides and working towards the establishment of a wider regulatory framework for CLSs. However, the government has not as yet made efforts to clarify the nature of usufructuary rights or adapt model MoUs drafted by the CLS facilitation team and have them signed as formal agreements between the Ministry and the chiefs to govern the operations of the pilot CLSs. LAP staff has even advised against the use, in draft MoUs, of language which might be interpreted by the chiefs as imposing requirements of accountability, disclosure of revenues, or significant commitments of stool resources to supporting CLSs. The government has so far not introduced a clear policy on the purpose and responsibilities attached to CLSs, and the parameters for the establishment of each pilot CLS remain somewhat ad hoc. What is clear is that in order to secure the votes that the chiefs command, the government in the short to medium term is unlikely to risk antagonis-

ing the chiefs by requiring public disclosure of land revenues and accountability in their use.

Although the LAP includes provisions for strengthening civil society participation and advocacy in relation to land management, this has been slow to develop and remains problematic at the time of writing. On the one hand, Ghanaian civil society has limited pre-existing capacity and virtually none in place for the engagement and advocacy on land. It is difficult to induce this by external intervention because of widespread deference to chiefly authority and a history of co-optation of civil society by both chieftaincy and political parties (Amanor 2001: 112-3). On the other hand, the Ministry has been reluctant to give up control over funds intended to support civil society partners or commission services from them, and there is a lack of alternative mechanisms such as independent trusts or programmes capable of managing funds to meet the donors' and government's requirements.

## Conclusion

This chapter has described how the new value of peri-urban land has triggered a multitude of struggles and negotiations. Although actions, statements, and beliefs as to what is just vary between villages, families, and individuals, one main tug-of-war can be outlined: the struggle between chiefs on the one hand and villagers on the other for the rights to allocate land and share in the revenue. Despite high local resistance, the chiefs in a number of case-study villages persisted in their style of land management, which was highly lucrative for them and sometimes for other selected members of the community – such as elders or royal family members – but extremely detrimental to the livelihoods of the poor majority. Farmers' tenure security, especially the aspect of assurance,<sup>76</sup> was severely corroded by the chiefs' actions.<sup>77</sup> Practices such as multiple sales and allocation of land unsuitable for residential purposes also threaten the tenure security of the new lessees. This poses the question of how chiefs are able to continue acting contrary to the wishes of the majority of the villagers, both old and new. I will discuss three determining factors.

A first factor encountered in this chapter is the erosion of customary checks and balances on chiefly functioning. Customary responsibility should be guaranteed by the existence of a council of elders, consisting of representatives of all major sections of the community, whose permission a chief needs for any decision he wants to take. We saw, however, that in many villages in peri-urban Kumasi, the councillors no longer represent the major families of the community, are co-opted or ignored, and that the customary notion of ruling in council has thus

been severely eroded. The second check on traditional rule, the possibility to destool a seriously malfunctioning chief, is also prone to difficulties. Charges have to be brought by the kingmakers, not by commoners, and will be judged by a council composed of other chiefs.

The second factor is found in the behaviour of government, which currently provides hardly any checks and balances on local land administration.<sup>78</sup> Their discourse as well as their actions point towards the existence of an informal 'policy of non-interference', inspired by the political power of the chiefs and the alliance between traditional and state elites. The fact that the government continually emphasises the sovereignty of the chiefs and that land administration rests exclusively in their hands gives additional legitimacy to the chiefs and provides them with ample leeway to administer land the way they please. The National Land Policy and the Land Administration Program do not seem to promise any change in this respect in the near future. On the contrary, the CLS pilot programme carries a significant risk that CLSs will strengthen the political and economic weight of the traditional authorities by providing formal recognition of their powers to administer and allocate land. If the government does not clearly spread the message of the legitimacy of communal interests in land and the need for accountability of the chiefs, then it will de facto allow traditional authorities to use enhanced and equipped CLSs to further tendencies of dispossessing community members of lands (cf. Antwi 2006:5)

The third explanatory factor lies in the fact that stool land management is characterised by a leading position for the chiefs and the prominence of customary law. This is the reality in most localities and has been recognised in the 1992 Constitution. On account of the prominence of customary law in the field of land administration, all actors in land struggles have to legitimise their actions and claims largely with appeals to customary law.<sup>79</sup> When circumstances change and new opportunities arise, they will try to use the unwritten and somewhat negotiable nature of customary law to construct norms in their own interest. Struggles over land will thus often take the form of interpretative struggles over meaning in which 'the power to name' can be a highly political issue (Bassett 1993:21; Shipton and Goheen 1992:309-311). The critical question is, which actor or group of actors has the power to issue definitions and is able to mobilise support – from community members, the traditional system, and the state – for its version of customary law? Since the chiefs are generally regarded as authorities in the field of customary law and as guardians of stool land, they are able to point to 'custom' to acquire and legitimate power over land in the local arena and to resist interference by the state.

In conclusion, the government of Ghana has indirectly legalised customary land tenure and the position of the chiefs as custodians of this

land. Besides the provision that customary land should be managed on behalf of and in trust for the people, the government hardly steps into local land management issues. State institutions established to check upon chiefly land administration do not in reality exercise effective control, and the Land Administration Project, despite the formulation of goals like equity and accountability, has not actually imposed any such requirements on the chiefs in the implementation process so far. In combination with the eroded local checks and balances, the chiefs have a free hand to determine their own position in customary land management. It seems that this has given the chiefs the power to overstretch the somewhat dynamic nature of customary law by manipulating it to suit their needs and legitimise their claims, resulting in the described detrimental effects on the tenure security of the people. Any substantial change in this situation requires two intimately connected transformations: the organisation and empowerment of local farmers, and a different attitude of the government towards chiefly rule and customary land management.

## Notes

- 1 Field work in Ghana on which this research is based was supported by the Netherlands Organisation for Scientific Research (NWO/WOTRO), Mordenate College, the Leiden University Fund (LUF), and the *Adatrechtstichting* (Customary Law foundation).
- 2 In large parts of southern Ghana, customary land is referred to as stool land in reference to the carved wooden stool which is a traditional symbol of chieftainship and is believed to contain the souls of the ancestors. In the north of Ghana, customary land is defined as skin lands, for here the chiefs sit on a hide. In other areas, such as the Volta Region and Greater Accra, where family heads have jurisdiction over land, we speak of family lands.
- 3 *Ohene* is the word for king or chief in (*Ashanti-*)*Twi*, the language of the Asante. Within the Ashanti Region each village chief (*ohene* or *odikro*) is subordinate to a paramount chief (*omanhene*), who again is subordinate to the Asantehene.
- 4 My main village of study was Besease, situated approximately twenty-three kilometres from Kumasi on the road to Accra. Furthermore, I studied four other villages on or near this road – Jachie, Tikrom, Adadeentem, and Boankra – and four villages on the road to Obuasi – Ahenema Kokoben, Kotwi, Brofoyeduru, and Nkoransa.
- 5 The term indigenous refers to the non-migrant population of a locality. Inclusion in this category can be an issue of ongoing negotiation and contestation.
- 6 The customary 'community' does not include all people living within a geographical unit such as a village, but only the indigenous people.
- 7 This customary usufructuary right is broader and should not be confused with the British usufruct. This also comes to the fore in the use of the term customary freehold as a synonym for customary usufructuary rights.
- 8 Some authors claim that the rule that no express grant is needed to farm or build on vacant communal land has been eroded by the increased use of land, resulting in a

- need to expressly apportion remaining vacant land (Ollennu 1962:32; Woodman 1996:91).
- 9 Under Ashanti customary law, individual property is inherited by the matrilineal family. Usufructuary titles thus become family property after the death of the usufructuary.
  - 10 Forfeiture results from a denial by the usufructuary of the landlord's title.
  - 11 See Ubink (2002-2004) for a description of case law regarding customary land management.
  - 12 'Town' refers to the built-up area of the village.
  - 13 Interview, 11 May 2003.
  - 14 Such manipulation is facilitated by the varying ways in which certain words, such as stool, stool land and ownership, are used in different contexts. For instance, the fact that the allodial title holder is often defined as the owner, without referring to the usufructuary title holder as the owner, gives ample leeway for reinterpretation.
  - 15 Interview with former Akyeamehene subchief of Tikromhene, 7 January 2004. The argument that the royal family fought for the land is also found in Rathbone (1996: 511).
  - 16 Interview with former Akyeamehene subchief of Tikromhene, 7 January 2004.
  - 17 When confronted with the many development projects in the neighbouring village of Jachie, the Tikromhene pointed out that he was building a primary school in his village. On further enquiry in the village, however, it turned out that this project was being financed by the EU.
  - 18 Interview with Besease youngster, 15 June 2003.
  - 19 Interview with Unit Committee Ahenema Kokoben, 11 November 2003. The Unit Committee forms the lowest level of local government in Ghana and is made up of five to fifteen people per village.
  - 20 Peri-urban Kumasi is exemplary for the whole peri-urban arena. Alden Wily and Hammond (2001:44, 69-73) describe the 'curtailment of communal property rights, through a form of feudalisation of land relations' as a problem occurring in the entire peri-urban arena of Ghana. According to Kasanga and Kotey (2001:18) evidence from all ten regional capitals 'confirms that the displacement of poor and marginalised families from their land is a national disease'. See for more literature on land struggles in peri-urban Ghana Abudulai 1996, 2002; Berry 2002; DFID 2001:28-30, D13-14; Gough and Yankson 2000; Hammond 2005; Kasanga et al. 1996; Kasanga and Woodman 2004; Kotey and Yeboah 2003:3, 19, 21, 53; Maxwell et al. 1998:3; NRI (Natural Resources Institute) and UST (University of Science and Technology) 1997:91; Toulmin and Longbottom 2001:ii-iii, 30; Ubink 2007a; Wehrmann 2002.
  - 21 During my fieldwork I did not find any NGO involved in land matters in peri-urban Kumasi. Discussions with church leaders in Besease revealed that these leaders were not in any way involved in land issues.
  - 22 Although stool land is officially leased rather than sold because the Constitution prohibits the sale of customary land (article 267(5)), nearly everyone talks about the 'selling' of land, and many people, 'sellers' as well as 'buyers', seem to regard it as a definitive transfer.
  - 23 Interview with members of the Unit Committee and the royal family of Brofoyeduru, 5 November 2003.
  - 24 *Ibid.*
  - 25 *Ibid.*
  - 26 Head of the extended family.
  - 27 Interview with farmer in Besease, 27 August 2003.
  - 28 Interview with farmer in Besease, 29 August 2003.
  - 29 Interview with farmer in Besease, 27 August 2003.

- 30 Interview with elder of Kontihene subchief of Beseasehene, 20 May 2003.
- 31 Interview with royal family members Boankra, 18 December 2003.
- 32 Interview, 15 April 2003.
- 33 The District Assembly is the second lowest level of local government in Ghana. An assembly member is the representative of an electoral area in the assembly.
- 34 Interview with former assemblyman Tikrom, 15 April 2003.
- 35 Interview with former assemblyman Feyiase, 8 April 2003.
- 36 Interviews with Kontihene subchief of Beseasehene and one of the Konti elders, 20 May and 1 July 2003.
- 37 The position of both chiefs and councilors is hereditary in the sense that it has to be filled by a person from a certain family – in the Ashanti region usually matrilinear. Within such a family, there are usually a number of people eligible to fill the position, of which the family will choose the most suitable candidate. Besides hereditary councilors, a chief can also appoint a number of non-hereditary councilors on the basis of their personal merit. When such a councilor dies, the position disappears, and the family will not be permitted to select a successor. See for a more elaborate discussion of election of chiefs and subchiefs Busia 1951:6-13; Danquah 1928:110; Hayford 1970:3; Kofi-Sackey 1983:66; Kumado 1990-1992; Obeng 1988:34-45.
- 38 See also Hayford 1970:73; Pogucki 1962:182; Sarbah 1968:66, 87.
- 39 Interview, 28 October 2003.
- 40 Interview with Unit Committee member Tikrom, 26 June 2003. Cf. Abudulai 1996; Kasanga 1996.
- 41 Interview, 26 June 2003.
- 42 Interview with Asantehene's Land Secretariat, 2 July 2003.
- 43 Interview with Kontihene subchief Besease, 1 July 2003.
- 44 Section 15 of the Chieftaincy Act, 1971 (Act 370), confers exclusive jurisdiction in any 'cause or matter affecting chieftaincy' – as defined at section 117 of the Courts Act, 1993 (Act 459), i.e. an action concerned with the nomination, appointment, election of a chief or destoolment – to the Traditional Council or, if a paramount chief is involved, to the Regional Houses of Chiefs. From such a case an appeal lies to the Regional Houses of Chiefs, then to the National House of Chiefs and finally even to the Supreme Court. This means that one cannot take such cases to the regular state courts, only to the Supreme Court in last instance. It must be noted, however, that the courts have not allowed for such a broad interpretation of the words 'cause or matter affecting chieftaincy', and thus the entire functioning of Traditional Councils falls outside their scope. For instance, land cases that are not concerned with the nomination, appointment, election or destoolment of a chief can be taken to the state courts.
- 45 Interview with Kontihene subchief of Ejisumanhene, 27 May 2003.
- 46 See, for instance, interview with elder of the Beseasehene, 5 June 2003.
- 47 Interview with Gyaasehene subchief of Ejisumanhene, 1 June 2003.
- 48 Interview, 29 June 2003.
- 49 Such as the chief's right to wild animal skins, tributes of fish, and communal work on his farm (Annor 1985:157; Busia 1951:44).
- 50 Interview with Okyeame subchief of Beseasehene, 12 June 2003.
- 51 Interviews at the Regional Lands Commission Kumasi, 9 April 2003; Regional OASL Kumasi, 27 June 2003; Ejisu Juaben District Assembly, 9 September 2003.
- 52 Interview, 9 September 2003.
- 53 Interview, 12 January 2004.
- 54 Interview, 9 April 2003.
- 55 Interview with District Chief Executive Ejisu-Juaben district, 9 September 2003.

- 56 Lands vested in the president in trust for a landholding community under the Administration of Lands Act, 1962 (Act 123).
- 57 It takes on average between six months and two years to process a document submitted to the Lands Commission (Grant 2004:95).
- 58 In a survey among 242 people in peri-urban Kumasi, 123 people (50.8 per cent) answered they had never heard of the LC. Of the 119 (49.2 per cent) who had heard of the LC, 65 (27 per cent) were not aware of its tasks and functions.
- 59 Cf. interviews with Deputy Regional Lands Officer Kumasi, 9 April 2003; and Technical Director Forestry, Ministry of Lands and Forestry, 15 August 2003.
- 60 Multiple sales of the same plot of land to several persons is a large and growing problem in peri-urban Accra, and is also described for peri-urban Kumasi (Edusah and Simon 2001; Oduro-Kwarteng 2003).
- 61 Interview director TCPD Ejisu-Juaben district, 27 May 2003, cf. planning officer TCPD Kuntanase district, interview 7 April 2003.
- 62 Chiefs can have their land demarcated by unofficial surveyors who do not interfere with planning and which leaves open the possibility of later changes in the plan. Such amendments were frequently encountered during fieldwork. In a DFID-sponsored project 34 of the 37 villages in peri-urban Kumasi possessed village layout plans, but the majority of these plans was prepared without reference to the statutory agencies responsible for planning (DFID 2001:D8, E13).
- 63 According to the law, the whole process of acquiring a building permit should not take longer than three months. But in 2003 the Ejisu-Juaben district had not seen a meeting of the Planning Committee in over two years (interview Director TCPD Ejisu-Juaben district, 27 May 2003).
- 64 Of 242 people surveyed in peri-urban Kumasi, 115 (47.5 per cent) had never heard of a building permit. The other 127 (52.5 per cent) had heard of it, but only 75 of them (31 per cent of the total) could actually explain what it is. When these same 242 people were asked whether they possessed any documents on the house, 85 answered yes, 83 no and the other 74 said that they did not know. Of the 85 that answered yes, 48 did not know what kind of documents, 29 said they did not have a building permit and eight said they did have a building permit. According to the deputy regional lands officer of Kumasi, 87 per cent of the people has no building permit and only ten per cent of the people tries to get a formal lease (interview, 20 September 2005).
- 65 Interview with Deputy Regional Lands Officer Kumasi, 16 December 2003.
- 66 Interviews with District Chief Executive Ejisu-Juaben district, 9 September 2003 and 12 January 2004.
- 67 Interview with District Chief Executive Ejisu-Juaben district, 9 September 2003.
- 68 Unreported judgment, no. 5/97 of 13 May 1997.
- 69 *Owusu v. Agyei* (1991) 2 G.L.R. 493, at 506.
- 70 See for an elaborate discussion of customary land law in Ghanaian courts, including access to courts and effects of court decisions, Ubink 2002-2004.
- 71 See for instance *Daily Graphic* 25 August 2003, p. 3; *Ghanaian Times* 5 August 2003, p. 1, 25 August 2003, p. 3.
- 72 Interview, 19 August 2003.
- 73 Interview, 3 December 2005.
- 74 Bierschenk 1993 describes the same phenomenon for Bénin.
- 75 See for instance paramount chief of Asante Asokore S.K.B. Asante 2003:9; president of the national house of chiefs Odeneho Gyapong Ababio II 2003:3.
- 76 Tenure security is often said to encompass three elements: extent, duration, and certainty. Certainty again is a function of two elements: (1) assurance in asserting rights, and (2) the costs of enforcing these rights, which should not be inhibiting (Migot-Adholla and Bruce 1994:3; Place, Roth, and Hazell 1994:19-21).

- 77 See Ubink 2007b for the effects of chiefly land (mis)management on popular perceptions of chiefs, their other functions such as dispute settlement and stimulating local development, and the institution of chieftaincy.
- 78 Aside from the courts that do in individual cases protect the usufructuary rights of community members.
- 79 To some extent state legislation and statements by state officials are also used as a local resource, but in general, claims are legitimised by referring to customary law.